IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

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| IN RE: | ) |
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| ALVIN A. GINGERICH, | ) Bankruptcy Case No. 95-50214 |
| Custom Construction, | ) |
| Coach House Garage Center, | ) |
| | ) |
| Debtor. | ) |
| ______________________________ | ) |
| | ) |
| COACH HOUSE, INC., | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) Adversary Case No. 95-5114 |
| | ) |
| ALVIN A. GINGERICH, | ) |
| | ) |
| Defendant. | ) |

OPINION

This matter having come before the Court for trial on a Complaint to Determine Discharge of Debtor; the Court, having heard sworn testimony and arguments of counsel and being otherwise fully advised in the premises, makes the following written findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure in support of the decision rendered in open Court on February 5, 1996.

Findings of Fact

The material facts concerning the relationship between the parties hereto and the incidents giving rise to the debt in question are not in serious dispute and will be provided in summary fashion below.

The relationship between the parties to this adversary proceeding began in July 1990, when the Debtor/Defendant, a carpenter by trade, began working as a salesman for Plaintiff's franchise operation located in East Alton, Illinois. Initially, the Debtor acted as an independent contractor, but was later made an employee of Coach House, Inc., with his primary responsibilities being the location of prospective customers for Coach House garages and the preparation of bids for potential purchasers. In the Summer of 1992, the Debtor entered negotiations with the Plaintiff for purchase of the East Alton franchise operation. These negotiations resulted in the execution of a franchise agreement (Plaintiff's Exhibit 4) dated September 21, 1992. Under this agreement, the Debtor agreed to purchase the East Alton franchise for the sum of $30,000 plus interest over a period of 5 years to be paid at the approximate rate of $600 per month. As the owner of the franchise, the Debtor continued acting in the same capacity as he had as an employee of Coach House, Inc., together with the other responsibilities of owning his own business. The course of dealing between the Debtor and the Plaintiff was relatively simple in that the Debtor would bid upon the building of a garage for an individual and, upon acceptance of the bid by a purchaser, the Debtor would arrange for a concrete slab to be poured for the garage and would also arrange for any other sub-contracting work other than the actual building of the garage. Once the concrete pad was poured, employees from the Plaintiff's home base, located in Arthur, Illinois, would arrive on the site and construct the garage from pre-fabricated materials in a relatively short period of time. The Debtor was responsible for paying all sub- contractors, including work done in pouring the concrete pad, and the Debtor was invoiced by

Coach House, Inc. for the cost of the pre-fabricated garage with the full amount of the invoice due within 30 days of the Debtor's receipt thereof.

From the period of September 1992 through July 1994, when the franchise agreement between the parties was terminated, the evidence indicated that the Debtor arranged for the construction of somewhere between 125 and 150 Coach House garages. The evidence also indicates that the Debtor was paid in full for all of these garage projects with the exception of one. In spite of the fact that the Debtor had received payment from all the purchasers for garages built, the evidence indicates that, by July 1994, the Debtor was indebted to the Plaintiff in the approximate sum of $143,375.80 for invoices on garages built that were never paid by the Debtor. As a result of this rather large indebtedness, the Plaintiff became concerned, and the Debtor was visited by Plaintiff's general manager, James Yoder, in April 1994. During this visit, Mr. Yoder requested to review the records of the Debtor's franchise operation as is called for in the franchise agreement, said request being flatly denied by the Debtor. On May 18, 1994, Plaintiff caused its attorney, Sharon Buckler, to send the Debtor a letter (Plaintiff's Exhibit 5) explaining that the Debtor was in default of the franchise agreement based upon various paragraphs of that agreement giving the Debtor 60 days to cure all defaults, including his failure to make available his books and records for inspection by agents of the Plaintiff. The May 18, 1994, letter also indicated that the Debtor should discontinue taking orders for Coach House garages until such time as he was able to cure the defaults under his franchise agreement and pay for the garages which he would then be ordering. In contravention to the terms of the May 18, 1994, letter, the Debtor failed to make his books and records available for review by the Plaintiff, cure the default balance on invoices due to the Plaintiff in excess of $140,000, and cease taking orders for Coach House garages. The evidence indicates that the Defendant continued to write orders for Coach House garages through July of 1994. As a result of the Debtor's failure to comply with the Plaintiff's request for cure, a letter was sent to the Debtor, on July 20, 1994 (Plaintiff's Exhibit 6), terminating his franchise agreement. Even though the franchise agreement had terminated, the Debtor was still obligated to pay the balance due to the Plaintiff and was still obligated under the franchise agreement to submit an audit of his books and records to the Plaintiff upon closing of the franchise operation.

As a result of the Debtor's continued failure to perform his duties pursuant to the franchise agreement, the Plaintiff filed suit against the Debtor in Douglas County, Illinois, late in 1994. During the discovery process in the Douglas County lawsuit, the Defendant failed to turn over any of his books and records as requested by the Plaintiff. As a result, the State Court entered an Order compelling Debtor to turn over the books and records. However, the Debtor never complied with this order and, instead, filed for relief under Chapter 7 of the Bankruptcy Code in March 1995. The instant adversary proceeding to determine the discharge of the Debtor under both 11 U.S.C. §§ 523 and 727 was timely filed in this Court, and a four-hour trial was held on February 5, 1996.

In the instant case, as in all cases concerning issues under 11 U.S.C. §§ 523 and 727, the credibility of the witnesses and the documentary evidence plays a critical role in the determination of the issues by the Court. In considering the credibility of all of the evidence in the instant case, the Court finds that the evidence presented by the Plaintiff was credible in that it was presented in a logical and forthright manner and there was nothing presented by the Defendant showing any serious discrepancy in any of the Plaintiff's evidence. As for the evidence presented by the Debtor/Defendant in the form of testimony, the Court finds that said testimony was not credible for many reasons.[1] In determining the credibility of the Debtor's testimony in this case, the Court had the opportunity to observe the demeanor of the Debtor, his appearance, what he said in response to questions, the manner in which he responded to questions, and how his responses related to the other witnesses and documents in the case. These factors, together with certain conduct of the Debtor in the course of this adversary proceeding, lead the Court to find that the Debtor was not forthright in his explanations about his loss of assets, inability to pay creditors, and failure to keep accurate books and records from which his financial condition could be determined. Although there were numerous facets of the Debtor's conduct which caused the Court to find that he was an unreliable witness, the Court here cites two examples which caused it the most

[1]The Defendant did not use or offer into evidence any documentary exhibits other than those of the Plaintiff offered and admitted by the Court.

concern. As stated above, prior to filing bankruptcy under Chapter 7 of the Bankruptcy Code, the Debtor was involved in a State Court lawsuit against the Plaintiff wherein the Plaintiff was seeking his books and records in an attempt to determine why he had been unable to pay the Plaintiff's debt in a timely manner and to determine if there might be any assets from which the debt could be paid. The Court notes that in that State Court lawsuit the Debtor never turned over his books and records as requested by the Plaintiff, and failed to do so even after the State Court had entered an Order compelling him to submit to Plaintiff's discovery requests. All of this in addition to the fact that the Debtor had refused to allow the Plaintiff to review his books and records as called for in the franchise agreement together with the Debtor's failure to submit an audit as was also required by the agreement. To compound the Debtor's refusal to turn over his books and records, the Court notes in the course of this adversary proceeding that the Debtor once again did not turn over books and records in discovery until he was ordered to do so by this Court. Even then, the Debtor turned over incomplete records giving only a weak explanation for his failure. Further, the Court finds that the Debtor never supplied tax returns requested by the Plaintiff for the years 1992 through 1994 (Plaintiff's Exhibits 1, 2, and 3), and the only way the Plaintiff was able to obtain them was through a subpoena of the Debtor's accountant, who then was only able to provide unsigned copies which the accountant purported to be the ones filed in the tax years in question. Finally on the issue of credibility, the Court finds that the Plaintiff was successful in impeaching certain testimony of the

Debtor which the Court found telling on the issue of the Debtor's character as a witness. The Debtor deducted certain costs of goods sold from his income in his 1992 through 1994 taxes. When he was deposed by the Plaintiff prior to trial in this matter, the Defendant admitted that he had included in costs of goods sold on his tax returns those invoices which had never been paid to the Plaintiff. At trial, the Defendant said that his answer in the deposition was incorrect and that he had only deducted those sums which he had actually paid and not also those for which he was liable. In reviewing the tax returns, submitted as Plaintiff's Exhibits 1, 2, and 3, the Court finds that the Defendant's testimony in his deposition is truly the accurate answer to the question rather than the answer that the Defendant gave at trial. These inconsistencies were further highlighted by the fact that, when questioned about certain other expenses which were deducted from the Defendant's 1992 through 1994 tax returns, the Defendant was able to give no explanation whatsoever of what those expenses were. In reviewing the tax returns, the Court is unable to determine any factual basis to support Debtor's inclusion of those expenses. All in all, the Court finds that the Debtor has not presented himself as an honest, forthright individual deserving of a discharge under 11 U.S.C. § 727.

## Conclusions of Law

Pursuant to 11 U.S.C. § 727(a)(3):

> The court shall grant the debtor a discharge, unless - . . .
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial

> condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

To justify the denial of a discharge under § 727(a)(3), the objecting party must prove by a preponderance of the evidence the elements noted above. Grogan v. Garner, 498 U.S. 279 (1991). Once the objecting party has overcome this burden, the burden of persuasion then shifts to the debtor, who must establish either that the debtor maintained adequate books and records or that his failure to keep adequate books and records was justified under the circumstances of the particular case. In re Esposito, 44 B.R. 817 (Bankr. S.D. N.Y. 1984); and In re Goblick, 93 B.R. 771 (Bankr. M.D. Fla. 1988). In the instant case, the Court finds that the Plaintiff has clearly shown that the Defendant failed to keep adequate books and records from which his financial condition could be ascertained. The Court bases this conclusion on several facts. First of all, it is undisputed that the Defendant is indebted to the Plaintiff in excess of $140,000 for unpaid invoices on garages which were built on Defendant's contracts. The evidence also shows that the Defendant was paid for the lion's share of the contracts which he entered into for the building of Plaintiff's garages. There has been nothing supplied by the Defendant in the form of a book or a record which would explain this loss of assets giving rise to the Debtor's failure to pay the Plaintiff's invoices when due. In support of this finding, the Court reiterates the facts pointed out above in connection with the Plaintiff's attempts to review what books and records the Debtor was able to produce. The Plaintiff was required to conduct extensive discovery and request orders from two different

Courts compelling the turnover of records by the Defendant before it received anything. Even then, the results were much less than adequate. In an attempt to show that his failure to keep and maintain accurate records was justified in the particular case, the Debtor attempts to argue that he was an unsophisticated businessman and that he simply did not know any better. Evidence presented by the Plaintiff suggests that the Plaintiff supplied the Debtor with a very simple method of keeping track of his income and expenses in connection with this particular business. This fact, together with the fact that the Debtor had considerable familiarity with this business even prior to his 1992 franchise purchase, the Court finds that the Debtor's excuse of being a poor businessman is insufficient to justify the Debtor's failure to act under the circumstances of this case. The Debtor also suggested that some of the records may have been lost in a move or that some may have been damaged by flooding in his basement. However, these allegations were supported by no other evidence and were merely suppositions of the Debtor, not soundly based in fact.

The same principles which are applicable to the Plaintiff's complaint under § 727(a)(3) of the Code are also applicable to Plaintiff's complaint under § 727(a)(5), which states that the Court shall grant a discharge, unless:

> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

As with § 727(a)(3), once the objecting party has met its initial burden of proving that there has been a loss, the burden then shifts to the debtor to satisfactorily explain this loss. Goblick, supra, at 775. Vague and indefinite explanations of losses, such as "monies were spent" or "loss through gambling," without supporting documents are unacceptable. Baum v. Earl Millikin, Inc., 359 F.2d 811 (7th Cir. 1966). The Court's finding that the Debtor failed to keep adequate books and records from which his financial condition could be ascertained in this case directly relates to the matters raised by the Plaintiff under § 727(a)(5). The Plaintiff has proven, by a preponderance of the evidence, that there has been a loss of assets in that, during the period from 1992 through 1994, the Debtor built somewhere in the area of 125 to 150 garages under the name of Coach House, Inc. The evidence further indicates that, in all but one of these projects, the Debtor was paid in full by the contract purchaser. Yet, the Debtor was unable to keep current and pay invoices as they became due from the Plaintiff such that a debt in excess of $140,000 accrued in less than two years. As stated above, the Court has found that the Debtor has not provided adequate books and records to explain his financial condition, and it follows that the Debtor has not provided adequate information to explain why he was unable to pay the invoices of the Plaintiff when he himself had clearly been paid by contract purchasers for the price of those invoices. This course of conduct of the Debtor is deceptive, and that fact is further indicated by evidence of the Plaintiff which shows that, near the end of his franchise operation, the Debtor was paid various deposits by contract purchasers for garages to be built and, not only did the Defendant fail to build the garages, but the Defendant failed to do any work while keeping the entire amount of the deposit. Thus, not only was the Debtor paid for all costs he was billed, the Debtor was also paid sums of money where he had no costs at all.

The Debtor's attempts at explaining his loss of assets to meet his liabilities were not acceptable and did not convince the Court that the Debtor had in any way accurately accounted for the considerable amount of money which flowed through his franchise operation from 1992 until 1994. This failure on Debtor's part is highlighted by all of the discrepancies and unanswered questions surrounding the tax returns filed by the Debtor in 1992, 1993, and 1994, such as his deduction for costs of goods sold for which he never paid, his deductions for business property expenses for which the Debtor has no explanation, and his deduction for mortgage interest on real estate which the Debtor now claims he does not own.

Finally, the Court addresses the Plaintiff's claim that the Debtor should be denied a discharge pursuant to 11 U.S.C. § 727(a)(4)(A), which states that the Court shall grant a discharge, unless:

> 4) the debtor knowingly and fraudulently, in or in connection with the case -
>
> (A) made a false oath or account;

Here, as with §§ 727(a)(3) and (a)(5), the burden of proof is upon the Plaintiff by a preponderance of the evidence to show that the Defendant made a false oath or account in his bankruptcy petition and schedules. See: Grogan, supra, at 279. Although single omissions are generally not sufficient to support objections to discharge under § 727(a)(4)(A), a series of omissions may create a pattern which demonstrates a debtor's reckless disregard for the truth and fraudulent intent may be presumed from that pattern of behavior. In re Clawson, 119 B.R. 851 (Bankr. M.D. Fla. 1990); In re Phillips, 187 B.R. 363 (Bankr. M.D. Fla. 1995); and In re Sausser, 159 B.R. 352 (Bankr. M.D. Fla. 1993). In support of its allegations under § 727(a)(4)(A), the Plaintiff has shown a series of omissions from the Debtor's schedules which, when all considered together, lead the Court to find that the Debtor knowingly and fraudulently did make false oaths in his bankruptcy schedules in connection with this bankruptcy case. Here the Debtor has shown that the Debtor engaged in a series of material omissions from his schedules and his statement of financial affairs and was careless in completing his petition papers in a manner which indicates that the Debtor that had a reckless disregard for the truth. Additionally, the Debtor's responses to questions regarding his errors were vague and ineffectual in convincing the Court that the omissions were merely immaterial and unintentional. The Plaintiff has shown, while the Defendant owes the Internal Revenue Service back taxes for the years 1984, 1985, and 1986, the Internal Revenue Service is not scheduled as a creditor. Additionally, the evidence showed that the Defendant borrowed some $30,000 from his father, some of which is still owed by the Defendant. The Defendant's father was not listed on the Debtor's schedules as a creditor. Further, Plaintiff has shown that the Debtor made substantial charitable contributions to his church during 1993 and 1994 amounting to nearly $25,000 which were not revealed on the Debtor's schedules in any form. The Debtor also failed to schedule any interest in real estate on his bankruptcy schedules even though his 1994 tax return shows that he took a rather large deduction for mortgage interest on real estate which he claimed an interest on in that year. The Debtor, in response to this, testifies that he has sold this real estate on contract and, as such, does not claim any interest in it. However, this transaction is not noted on his schedules as it should have been. Finally, in considering the Plaintiff's evidence under § 727(a)(4)(A), the Court notes that there is a large discrepancy between the income claimed by the Defendant in the years 1992 through 1994 on his bankruptcy schedules and that which was claimed by the Defendant on his tax returns. From the evidence before it, the Court is unable to determine which is accurate, the tax returns or the bankruptcy schedules, or if either is accurate. As such, the Court finds that, taken as a whole, the omissions and discrepancies in the Debtor's bankruptcy schedules lead the Court to find that the Debtor's discharge should also be denied for the reason that the Debtor has knowingly and fraudulently made false oaths and accounts in connection with his bankruptcy case.

Having found that the Debtor's discharge should be denied pursuant to §§ 727(a)(3), (a)(4)(A), and (a)(5), the Court need not address the Plaintiff's contention that its claim should be non-dischargeable pursuant to 11 U.S.C. § 523(a)(6) in that said issue is moot in the absence of a discharge being granted in the Debtor's favor.

ENTERED: February 20 1996

/s/ GERALD D. FINES
United States Bankruptcy Judge